—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

SAMUEL C. PANDOLFO,
Plaintiff in Error,

vs.

BANK OF BENSON, a Corporation, et al.,
Defendants in Error.

No. 3589

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE DISTRICT OF ARIZONA, AT PHOENIX, HONORABLE DAVID P. DYER, DISTRICT JUDGE.

Brief of Defendants in Error

THOS. ARMSTRONG, JR.,
ERNEST W. LEWIS,
R. Wm. KRAMER,
Phoenix, Arizona,
Attorneys for Defendants in Error.

Filed this..... day of....., 192.....

FRANK D. MONCTON, Clerk,

By.....
Deputy Clerk.

Bower Co., Phoenix

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STATEMENT OF CASE.

Writ of error to reverse a judgment rendered in favor of the defendant below and the defendant in error herein dismissing the complaint of the plaintiff below and the plaintiff in error herein with costs to the defendant below. Said judgment was rendered on failure of the plaintiff below to amend his complaint; the lower court on hearing having granted the defendants' motion to strike certain portions of the plaintiff's complaint and having sustained the defendants' demurrer to said complaint.

BRIEF AND ARGUMENT.

There are two assignments of error sub-divided into six reasons why the judgment should be reversed. The first assignment, containing five subdivisions, assigns error on the part of the court in sustaining the motions to strike of the defendants below certain words from plaintiff's petition as surplusage. The second assignment assigns error on the part of the court in sustaining the demurrer of the defendants below to the petition of the plaintiff below and plaintiff in error herein.

We shall take them up in the order assigned.

I.

MOTIONS TO STRIKE.

According to the contention of counsel for the plaintiff in error in their Brief on Page 16, the effect of the alleged libelous letter set out in the plaintiff's petition is as follows:

> "I am writing you, gentlemen, with reference to this man Pandolfo as he is a double-barrelled *crook*. * * * He has *crooked* more people and in more ways than most any fellow we have ever had in this part of the country in a long time. * * * He is one of the *crookedest* white men I have ever seen."

The innuendos, which the court ordered to be stricken as surplusage and the striking of which are assigned as error, attempted to give to these words the following meanings:

(a) On line 24, page 5—"Criminal conduct".

(b) On lines 30, 31 and 32, page 5, and line 1, page 6,

"Criminal conduct and practices of embezzlement and theft and obtaining money under false pretenses in and about the transaction and discharge of financial matters."

(c) On lines 2, 3 and 4, page 6.

"That the plaintiff had been guilty of a violation of the criminal laws of the States of Texas, New Mexico and Arizona."

(d) On lines 4, 5 and 6, page 6.

"and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses."

(e) On lines 7, 8 and 9, page 6.

"by directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons."

The province of the innuendo in the law of defamation is well stated in Wallace vs. Homestead Company (Iowa) 90 N. W. at 840.

"An innuendo is not an averment, but only matter of explanation. It means nothing more than the words 'id est', scilicet', or 'meaning', or 'aforesaid' as explanation of a subject-matter sufficiently expressed before; * * * * An innuendo cannot extend the sense of the expressions in the alleged libel beyond their own meaning. Where the words used are ambiguous or admit of different applications, an innuendo may confine or direct them, but cannot extend the intendment of an expression beyond the customary meaning. If this were not true, an explanation of antecedent matter would be converted

into a direct averment. The words themselves, in the absence of ambiguity, must be taken in that sense in which they would naturally be understood by those who read and understood them."

We note that in the 1911 Edition of Webster's New International Dictionary of the English Language, the definition of "crook" and allied words used is perhaps more moderate than the definition quoted by counsel for plaintiff in error in their brief.

"Crook, n. (6) A person given to crooked or fraudulent practices; a swindler, sharper, thief, forger, or the like.

Crook, v. (3) To turn from a straight or right course or path.

Crooked, a. (2) Not straightforward; deviating from rectitude; distorted from the right.

> They are a perverse and crooked generation. Deut. XXXII, 5.

(3) False; dishonest; fraudulent; as crooked dealings."

In general these definitions tend to give to these words a meaning of sly dishonesty, trickery, and swindling. When one is warned against a crook he is warned against the sharp tricks and unethical business practices, that might separate him from his money if not on his guard. People have not, however, given to these words the hue of criminality which the plaintiff has set up in his innuendos. People commonly think of a crook as one who has deviated from the paths of truth, uprightness and business dealings beyond reproach, as one who is given to shady practices, but not as one who has as yet stepped across the line into criminality. He may be skating on thin ice, but he has not actually broken the law. The meaning which the plaintiff has attempted to

give to these words, namely, criminal conduct and practices, embezzlement, theft, obtaining money under false pretenses, violation of the criminal laws of Texas, New Mexico and Arizona, larceny, directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons, are utterly unreasonable and outside of any ordinary meanings which popular usage ascribe to such words.

We submit that the reasonable meaning of the alleged libelous words will not support the meaning sought to be attached thereto by the plaintiff in the innuendos contained in his amended petition. This being true the innuendos were surplusage and the lower court correctly permitted them to be stricken out on proper motion. In order to uphold the action of the court below in granting the motion to strike it is not necessary to determine whether the alleged libelous language was or was not libelous per se. If the statements were libelous per se nevertheless innuendos giving an utterly unreasonable interpretation to them would be surplusage, and the same would be true if the language was not libelous per se. It is only an innuendo assigning a reasonable construction or meaning to alleged libelous statements which can survive a motion to strike. The lower court construed the alleged libelous words in their plain, popular sense, the sense in which people would naturally understand them, and decided that in no event could they be given the meaning attached to them by the plaintiff.

Brinsfield v. Howeth, (Md.) 68 Atl. 566.

> "If there was a local or provincial use of the word which gave it the meaning contended for, or if there were extrinsic circumstances by reason of which it was so understood by the hearers at the

time the words were uttered, these facts should be alleged by way of inducement. Newell, Slander and Libel (2d Ed.) 603. The innuendo cannot enlarge the natural and ordinary meaning of the words."

Bearce et al., vs. Bass, (Maine) 34 Atl. at 414.

"The rule is too well settled to need citation of authority that an innuendo 'is only explanatory of some matter already expressed. It serves to point out when there is precedent matter, but never for a new charge. It may apply to what is already expressed, but cannot add to or enlarge or change the sense of the previous words.' 1 Chit. Pl. 407; 1 Wms. Saund, 243a, note 4; Emery v. Prescott, 54 Me. 389.

It is the province of the court to determine, in the first instance, whether the language published is reasonably susceptible of the meaning ascribed to it by the plaintiffs' innuendo."

Scofield vs. Milwaukee Free Press et al. (Wisconsin) 105 N. W. 227.

"We have already said enough to indicate our view that the words themselves, without any elucidation by way of innuendo, as to the charge intended, are capable of a defamatory and libelous meaning. Hence the assertion in one part of the complaint that they served to charge a crime, if untrue, may be disregarded as mere surplusage."

Labor Review Pub. Co. vs. Galliher (Alabama) 45 So. 188.

Fitzpatrick vs. Age-Herald Pub. Co. (Alabama) 63 So. 980.

Posnett vs. Marble, (Vermont) 20 Atlantic, 813.

The cases cited by counsel for plaintiff in error are not in point. Morrison vs. Smith et al., 69 N. E. 725,

did not come up on a motion to strike. The decision in that case merely holds that if the plaintiff at the trial could not prove that the innuendo pleaded was a reasonable interpretation of the words, she should not fail but should be entitled to make the defendants defend against the plain import of the words which were libelous per se. In other words the fact that the plaintiff had pleaded an innuendo which was impossible to support, would not prejudice her and the case was permitted to be tried on the reasonable construction of the alleged libelous words. The court said:

> "If no innuendo was necessary to be averred in the complaint in order to state a cause of action, then her averment of a libelous meaning by innuendo was surplusage."

The question did not come before the New York court, as it comes in the instant case, on a motion to strike and eliminate innuendos set up by the plaintiff, where the interpretation chosen by the plaintiff would not on any possibility be naturally conveyed to persons of ordinary understanding. In the New York case the construction alleged by the plaintiff was that "the meaning of this advertisement was that the plaintiff had been the subject of an unchaste and indecent experience." At the trial a motion to dismiss the complaint was granted upon the ground that the words could not be given the construction placed upon them by the plaintiff. The Appellate Division affirmed the judgment of dismissal on the ground that the plaintiff had tendered an issue as to whether the words used were "susceptible per se of the interpretation that they charge her with unchastity" and that the plaintiff had failed "to sustain the burden thus placed upon her." The Court of Appeals reversed the judgment and ordered a new trial.

The Court went so far as to characterize as "surplusage" the averment of a libelous meaning which could not be supported by the reasonable meaning of the words.

We submit that if the case had come before the New York Court of Appeals, on appeal assigning error to the lower court because it sustained a motion of the defendants to strike the averment as "surplusage", the New York Court of Appeals would have dismissed the appeal.

The other case cited by counsel as authority for the proposition that the motions to strike ought to have been denied is also not in point. It did not come up on a motion to strike and the court did not by way of decision of dicta advert to the question raised by the motions to strike in the instant case.

In view of the foregoing facts and the authorities cited, the lower court did not commit error in granting the motions to strike.

II.

DEMURRER.

This suit is brought against banking corporations alleged to have organized themselves into and to conduct and operate a voluntary association known as the "Arizona Bankers' Association". (Transcript of Record, page 5.)

The limit of liability of members of an unincorporated association is that the members are responsible for tortious acts committed by the society where it can fairly be assumed that they were within the scope of the purpose for which the organization was formed.

5 Corpus Juris, 1364.

No such allegations of fact appear in the complaint.

It cannot be assumed that the purpose of the formation of the Arizona Bankers' Association was to engage "in the business of printing and publishing a certain book and pamphlet called 'Proceedings of the Arizona Bankers' Association'." In fact the title of the book or pamphlet shows that it merely sets out to be an account of the proceedings of the Association. The purpose for which the organization was formed would naturally be to promote the welfare of banks and banking within the state and the publication of an account of the proceedings of the Association is not a matter within the scope of the purpose of the organization for which all the members can fairly be said to be responsible.

One member of an association cannot by his unauthorized acts impose on another member a liability for tort.

The syllabus in Master Builders Ass'n. et al., vs. Domascio, (Colo.) 63 Pac. 782, states:

> "2. A notification by a builder to an architect that, if he should receive plaintiff's bid for work, numerous members of a master builders' association would refuse to bid thereon, would not authorize a judgment against such members, in the absence of any evidence to show authority of the builder to give such notice."

The vice in the pleading of the plaintiff's cause of action in his amended complaint is clearly shown by an attempt to analyze the allegations in regard to publication, in order to find out when the publication of the alleged libelous matter was made, by whom it was made and by whose authority it was made.

The amended complaint states that the "defendants, under the said style of Arizona Bankers' Association,

were engaged in the business of printing and publishing a certain book and pamphlet called 'Proceedings of the Arizona Bankers' Association' and that the defendant, Morris Goldwater, as the secretary of said Arizona Bankers' Association, knowingly acted with the said Arizona Bankers' Association in printing and publishing and distributing the said book and pamphlet so printed and published containing said proceedings of said Arizona Bankers' Association to the Public. (See Transcript of Record, page 6.)

In the next paragraph of the amended complaint, it is alleged that "said book and pamphlet was at all such times printed and published yearly by said Arizona Bankers' Association assisted by Morris Goldwater, defendant, and was by them largely circulated throughout the States of Arizona, Texas, New Mexico, California and Illinois, and particularly throughout the entire states of Arizona and New Mexico, where the plaintiff is well known, and throughout the United States of America, generally." (Transcript of Record, page 6.)

It is interesting to note that in the first of the foregoing quotations the *defendants under the style of Arizona Bankers' Association,* printed and published the book, and that defendant, *Morris Goldwater,* as Secretary of the Association, *acted with the Arizona Bankers' Association* in printing, publishing and *distributing* the book. From this it can be gathered that all the defendant banks printed and published the book but the distribution was the act of the Association and its Secretary only.

The plaintiff alleges that the *defendants* on or about the.....day of May, 1918, published the alleged defamatory article in Vol. 10 of the book known as the "Proceedings of the Arizona Bankers' Association" setting it out in full.

The next paragraph of the amended complaint alleges "And, having so published said false, defamatory and libelous matter of and concerning the plaintiff, the defendants circulated the same and caused it to be circulated among business men, bankers and others throughout the States of Arizona, Texas, New Mexico, California, Illinois and other States of the United States." (Transcript of Record, pages 9 and 10.)

The pleadings do not specify the theory on which the plaintiff bases his cause of action. Was it the publication of the alleged defamatory matter in the book which is the gist of the plaintiff's cause of action, or is the gist the circulating of the published volume? It is not alleged whether the circulating was done by the defendant Morris Goldwater as Secretary, and the defendant banks are liable as principals for his act as agent, or whether the circulating was done by certain of the defendant banks, and the other members of the association are to be held liable for the tortious acts which they are not alleged to have authorized or ratified. These questions are vital in regard to the question of malice. If the defendant banks are being held liable on the ground of agency, perhaps they can be held responsible for the malice of their common agent, but we know of no rule of law by which in an offence requiring malice, the malice of one can be imputed to another in order to constitute that one a joint tort feasor.

There is authority for the proposition of law that one partner in a commercial firm has no authority to bind the firm by the gratuitous publication of a libel and by analogy we submit that one member of a voluntary association cannot bind the other members by the gratuitous publication of a libel.

In Woodling vs. Knickerbocker, 31 Minn. 268, 17 N. W. 387, the defendants were dealers in furniture.

The plaintiff purchased a table and returned it as unsuitable. The defendants placed the table outside their store placing on it libelous placards concerning the plaintiff. The court said:

> "One can be held liable for a libel published by another only because he has authorized him to make the publication. There is nothing in the nature of the business of this firm—that of dealing in furniture or draperies—from which authority to one partner or to a servant to gratuitously publish a libel can be implied."

In Frizzell vs. Woodman Publishing Co., 130 S. W. 695, the defendants were partners in the publication of the "Woodman Journal", a periodical published monthly in the interests of the "Sovereign Camp Woodmen of the World", but only one of the defendants had done any act furthering such publication within the period of one year fixed by the statute of limitations. It was held that he only, and not the other defendants, was liable.

The law is clear in regard to non-business associations, i. e., associations not formed for the purposes of pecuniary profit, that the individual liability of a member on a contract made by the association or committees depends upon the application of the law of agency, and authority to create such liability will not be presumed or applied from the existence of a general power to attend to or transact the business or promote the objects for which the association was formed, except where the debt contracted is necessary for its preservation.

Richmond vs. Judy, 6 Mo. App. 465, states:

> "Associations and clubs, the objects of which are social or political and not for purposes of trade or

> profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by reason of the acts of such individuals or of their agents; and the agency must be made out—none is implied from the mere fact of association."

We submit that the same principles apply to the torts of members of a voluntary non-business association. Liability for torts can be fastened upon the individual members only by reason of the acts of the said individuals or of their agents. This agency must be made out and none will be implied from the mere fact of association.

We submit that it cannot be contended that the Arizona Bankers' Association was a partnership. The Supreme Court of the United States has held that it is ultra vires for a National Bank to become a member of a co-partnership.

> Merchants National Bank vs. Wehrmann, Executrix, 202 U. S. 295, 50 L. Ed. 1036.

The same prohibition extends to corporate State banks. See Bowles Banking, page 29.

Note 30, Subdivision C, 5 Corpus Juris, 1364, referred to on Page 19 of the Plaintiff's in Error brief, has to do with constructive assent in cases of contract. "It has been suggested that the member constructively assents to the contract when it is in furtherance of the common object and purpose of the association." However, it would be a very different matter for the law to say that the law presumes that a member of an association assents to a tort committed by a fellow member. That is the constructive assent which will have to be implied in the instant case. If it could be assumed that all the members constructively assented to the publi-

cation of the alleged libelous letter in the annual of the association on the ground that it was an act in furtherance of the common purpose or object of the association, that assumption will not be sufficient. That does not seem to be the publication for which the plaintiff is claiming damages. The subsequent circulation of the annual among business men seems to be the gravamen of the plaintiff's complaint. Certainly no court will assume that every bank constructively assented to the wrongful circulating of the annual by other banks. The complaint does not allege that each subsequent publication was expressly authorized by every defendant bank. Without such averment the only alternative is for the law to presume that every one of the many defendants constructively assented to the wrongful circulating of the annual by the banks which actually made the publication.

Counsel for the plaintiff in error in their brief make the bold statement that there is nothing which appears on the face of the amended petition that shows or could be construed to show that the libelous article is a privileged communication. With this interpretation of the amended complaint we disagree most emphatically. The original publication of the alleged libelous letter was made by the Secretary of the Association to the members in meeting assembled.

We submit that that publication was privileged on the grounds of common interest, self defense and self protection. The publication in the annual was privileged for the same reason. Whether specific publications alleged to have been made later throughout certain states of the United States were privileged depends on the relationship existing between the banks making the publication and the individual or corporation to whom the publication was made. It cannot be said that as a matter of

law there is nothing which can be construed to show that the publication was privileged.

A case which discusses clearly and concisely, matters raised by the demurrer in the instant case is *Warner vs. Missouri Pacific R. R. Co.,* 112 Fed. 114, decided by the Circuit Court of Western District of Tennessee in 1901. The following extracts from the decision show the questions which were raised in the court's mind and the reasoning in regard to the correct legal principles applicable thereto.

> "It is important to examine the exact averments of this declaration in that behalf. It opens on this point: 'That on the 18th day of June, 1899, the said defendants (the three associated corporations being the only defendants) wrote and published of and concerning the plaintiff the following false, malicious and defamatory letter, with intent to defame the plaintiff'. It closes on the same point thus: 'Plaintiff avers that said libelous writing is false; that the same was made and published of the plaintiff by the defendants falsely and maliciously, with the deliberate intent and purpose to defame him, the said plaintiff.'
>
> There are no facts stated in the declaration tending to show any malice, except such as may be implied from the face of the privileged communication itself, and such as may be implied from the averment that it was published by the defendant, no matter how. It is not in any way shown how it was published, except by the letter of the superintendent to the addressee, and as to the writer no ill will or express malice is anywhere averred. 'A complaint showing on its face that the alleged libelous publication is privileged will be demurrable, notwithstanding an allegation that the publication was false and malicious. If a publication is privileged, express malice must be averred. It is not sufficient to allege that the language used was false and malicious, but

it must be averred that the defendant acted maliciously'. 13 Enc. Pl. & Prac. 59.

Now, how is it to be averred that a defendant corporation 'acted maliciously'? And how is this 'express malice' to be proved? Clearly, even as between mere individuals, the opening clause of the declaration falls within the condemnation of the paragraph just cited from the Encyclopedia. Does the other clause of the declaration meet the requirements of the law of pleading, as stated in the Encyclopedia? Is the second clause any different from the first? There is some difference in the phrasing of the words, but nothing more, unless a difference is to be found in the use of the word 'deliberate' in the second clause not found in the first, and the addition of the word 'purpose' in conjunction with 'intent'. I have wished to trace the cases out, both as to individuals and corporations, to see how 'express malice' is averred, but the reports rarely give the pleadings, and it is difficult to do so in busy times, for either court or counsel.

If we turn, now, to the great case of Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, we find, in a case where a conductor grossly maltreated a passenger with every circumstance of contumely and disgrace, that the court decided that a railroad corporation is not liable to exemplary or punitive damages for an illegal, wanton, and oppressive arrest of a passenger by the conductor of one of its trains, which it has in no way authorized or ratified.' And in the subsequent and equally great case of Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, the same ruling was applied in a libel case based on a personal letter written by the defendant corporation's 'general manager'. The court said:

> 'In this case no specified authority was pretended to have been given the general manager, Leitch, to write the letters which he sent to Brown, or to authorize the publication of any-

> thing whatever in the periodical named. We are, then, limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leitch had the necessary authority to act for the company in this business'. 172 U. S. at page 544, 19 Sup. Ct. at page 300, and 43 L. Ed. at page 548.'

This was said both as to compensatory and punitive damages, and the corporation was given a new trial.

Neither of these rulings arose upon a question of pleading, but one cannot read these and other cases without seeing that they are developments of the law of malice as applied to corporations, and are intended to correct misunderstandings prevalent in adjudicated cases. On the general principles of pleading, whether at common law or under our modern codes such a condition of limitation on the liability of a corporation for the express malice of its agents should require, and does, in my judgment, a special averment of authority or of ratification, or else such a special statement of facts as would on their face show by the averments that authority or ratification is to be reasonable applied. This kind of pleading would save long trials of insubstantial suits, and that is what pleadings are intended to do. The general averment that a corporation 'acted maliciously' is inappropriate to its limited liability and incongruous in fact. It does not give a defendant corporation notice of what it has to meet with regard to its dealings with its agents that should bind it to a liability for them on account of their malicious acts. It is appropriate enough as to an individual, or as to the agent of a corporation, in a personal suit against him, to say that he 'acted maliciously', but a corporation cannot 'act maliciously'. It only authorizes its agents to do so, and this authority is the substantive averment; or it ratifies the act of the agent, and this ratification becomes the substantive aver-

ment; or else the substantive averment is to be found in a 'statement of facts' which shows on the face of that statement that the authority or ratification is to be implied. Nothing like either of these is shown in this declaration, and on that theory the demurrers should be sustained."

Candor compels us to state that in spite of the irrefutable arguments in the decision the court did not sustain the demurrer. We submit that the cogent reasoning of the above decision applies even more directly to the instant case. In the amended complaint there is no averment of ill will or malice on the part of any agent which could be imputed to the defendant corporation, nor are particular facts pleaded which would tend to show express malice on the part of any agent which could be imputable to the corporation because of his authority to make the corporation responsible for his express malice. The amended complaint is to the effect that "defendants * * * intending, wickedly and maliciously, to injure the plaintiff in his good name, fame and credit * * * did * * * publish a certain false, wicked, malicious, defamatory and libelous article." (Transcript of Record, pages 7 and 8) and also "that the defendants well knew that said statements * * * were absolutely false and untrue, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff." (Transcript of Record, page 10.)

A corporation can only act through its agent and a corporation can only act maliciously by authorizing or ratifying the express malice of a particular agent. We submit that a complaint which is silent in regard to the agent and merely states that the corporation "maliciously intended" and acted with "malicious intent" is fatally defective.

Counsel for plaintiff in error in their brief quote from Vol. 5, Fletcher's Cyclopedia Corporations, page 5245, as authority for the proposition that a demurrer will not lie against a declaration because it fails to allege that the words complained of were uttered by authority of the corporation or that the utterances were subsequently ratified. The case cited by the text writer is *Hopkins Chemical Co. vs. Reed Drug and Chemical Co.,* 124 Md. 210, 92 Atl. 478. The declaration in that case alleges that the "defendant, its agent or agents, * * falsely and maliciously spoke to one" * * * the alleged defamatory words about the plaintiff's tooth paste. The declaration alleges that the words were spoken by an agent of the defendant company and the facts alleged show sufficiently that the agent was acting in the course of his master's service and for his master's benefit, and within the scope of his employment. In the instant case there is no allegation that the subsequent publications were made by any agent of the corporations. The corporations only could act through agents, but there are absolutely lacking any averments sufficient to sustain the inference that in making a subsequent publication the act of such agent was within the general scope of his employment and that it was not merely the result of his own personal malice.

We respectfully submit that the lower court was correct, both in granting the defendants motions to strike and in sustaining the demurrer, and therefore the judgment should be affirmed.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. Wm. KRAMER,
Attorneys for Defendants in Error.